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87-722

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO.

VELMA DODD,

Administratrix of the Estate of Dwayne Dodd

Petitioner

- vs -

CITY OF NORWICH and ERIC LARSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. In a Monell action brought by the estate of a child killed by a police patrolman, does City of Los Angeles v. Heller totally insulate the municipality from liability merely because the patrolman was not liable, when the patrolman's action had been ordered by a supervisor carrying out official municipal policy?

2. Do Daniels v. Williams and Davidson v. Cannon, holding that a deprivation of due process cannot result solely from negligence, extend to deprivations of the Fourth Amendment right to be free from unreasonable seizures?

3. Under Tennessee v. Garner, is a "seizure" complete for Fourth Amendment purposes as soon as the first handcuff is applied in the field?

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The Petitioner, VELMA DODD, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 31, 1987.

OPINION BELOW

The final opinion of the United States Court of Appeals for the Second Circuit, after reargument, is reported at 827 F.2d 1 (2d Cir. 1987), and appears in the Appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on August 31, 1987. This petition for certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. In a Monell action brought by the estate of a child killed by a police patrolman, does City of Los Angeles v. Heller totally insulate the municipality from liability merely because the patrolman was not liable, when the patrolman's action had been ordered by a supervisor carrying out official municipal policy?

2. Do Daniels v. Williams and Davidson v. Cannon, holding that a deprivation of due process cannot result solely from negligence, extend to deprivations of the Fourth Amendment right to be free from unreasonable seizures?

3. Under Tennessee v. Garner, is a "seizure" complete for Fourth Amendment purposes as soon as the first handcuff is applied in the field?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

U.S. Constitution, Amendment XIV:

...No State...shall...deprive any person of life, liberty or property, without due process of law....

42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

STATEMENT OF THE CASE

Dwayne Dodd, a sixteen year old boy and the son of the plaintiff, was killed by the defendant Eric Larson, a Norwich, Connecticut police officer. The district court, which tried this case without a jury, made the following relevant findings of fact: "Dwayne Dodd and Jervis Bell were robbing a house in the City of Norwich, which, unbeknownst to them, was equipped with a silent burglar alarm. Two police officers were dispatched to the house: Eric Larson and Larry Rice. Larson took a position at the rear of the house and Rice at the front of the house. Rice observed, through the front door, two persons inside the house and informed Larson that there were two or more burglars. Shortly thereafter, Dodd stuck his head out an open window in the

rear of the house. Larson, with his gun drawn, ordered Dodd to come out of the house. Dodd complied and fell through the window to the ground below among some shrubs.

While Dodd was lying on the ground, Rice returned to the rear of the house and saw Dodd. Then Rice went again to the front of the house and apprehended Bell who ran out the front door. While Rice was in the front, Larson decided to handcuff Dodd. To accomplish this task, Larson ordered Dodd to place both hands in front of his head and lie with his face on the ground. (Dodd had fallen with his left hand in front of his head and his right arm bent with his hand partly under his chest.) Dodd did not comply and remained in the position in which he had fallen.

Larson then approached the defendant and knelt in front of Dodd's head within one foot of him. With the gun held in his right hand, Larson placed a cuff on Dodd's left wrist. Larson then pulled the left wrist to the small of Dodd's back. Larson released the left hand and the handcuffs and reached for Dodd's right hand. Dodd then jerked forward and reached, with his right hand, for Larson's gun. Larson instinctively reacted by pulling his hand (and the gun) away from Dodd. During this scuffle, the gun discharged and Dodd died within a few minutes."

The Norwich police chief testified that it was official municipal policy in Norwich that police officers hold their service revolvers in one hand while attempting to handcuff prisoners with the other hand,

without waiting for police backup, and that during this process the officer's finger be kept on the trigger of the revolver. The training officer of the Norwich Police Department testified that he had instructed Officer Larson and all other officers to make arrests in this manner. It was undisputed that Officer Larson was carrying out this order, in pursuit of this municipal policy, at the time of the killing in this case.

The plaintiff's expert witness, the former deputy chief of the Los Angeles, California, Police Department, was described by the district court as having "impeccable credentials...." He testified that the municipal policy described above was grossly negligent, constituted deliberate indifference to the safety of persons

arrested, and made it inevitable that some arrestee would die as a result.

The district court entered judgment in favor of the individual police officer defendant. It did so by holding that (1) even gross negligence does not constitute a substantive due process violation actionable under 42 U.S.C. §1983, (2) if the police officer was negligent, he was not negligent with respect to the deceased because the standard of care violated existed only to protect the safety of the officer, (3) the municipality could not be held liable unless the officer were liable and, accordingly, judgment also entered in favor of the municipality. The Court did not consider the Fourth Amendment issue.

On appeal, the Second Circuit initially accepted the trial court's holding respect-

ing the simple negligence claim against the individual police officer, but reversed the holding that the municipality could not be held liable for a Fourth Amendment violation or a substantive due process violation in the absence of individual officer liability, and remanded as to the individual officer for a finding as to the reasonableness of the officer's use of this particular type of deadly force in seizing the person of the deceased. After reargument, however, one judge changed his vote and the Court of Appeals affirmed the judgment of the district court. In his dissenting opinion, Judge Pratt correctly summarized the majority holding as follows:

"(1) Once a police officer applies a single handcuff to an arrestee, the 'seizure' is complete for fourth amendment

purposes...and there is no duty of reasonableness under Tennessee v. Garner, 471 U.S. 1 (1985), for anything that follows.

"(2) Any municipal arrest policy, so long as it does not authorize the intentional use of unreasonable force, is immune from fourth amendment scrutiny, no matter how likely it might be to cause 'inadvertent' injuries or deaths.

"(3) The Supreme Court's holdings in Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986), that a deprivation of due process cannot result solely from negligence, extend to deprivations of the fourth amendment right to be free of unreasonable seizures...."

Based upon that analysis, the ruling of the district court, holding against the

plaintiff in all respects, was affirmed.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS IS AT ODDS WITH THE HOLDING OF THIS COURT IN CITY OF LOS ANGELES V. HELLER.

In a Monell action brought by the estate of a child killed by a police patrolman, City of Los Angeles v. Heller does not insulate the municipality from liability merely because the patrolman was not liable, when the patrolman's action had been ordered by a supervisor carrying out official municipal policy.

Contrary to the holding of the Court of Appeals in this case, City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571 (1986), does not hold, nor has this court

ever held, that individual police officer liability is an essential prerequisite to municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978). Heller, on the contrary, stands for the limited proposition that a municipality cannot be liable for constitutional violations under Monell unless the act of the municipality has proximately caused the plaintiff's constitutional loss.

In this case, neither the district court nor the Court of Appeals has held that the plaintiff suffered no constitutional injury. Rather, the district court held only that the individual patrolman whose gun discharged "did not violate Dodd's constitutional rights." 603 F.Supp. at 517. No court has yet determined whether in fact the plaintiff suffered a

constitutional deprivation. Indeed, one of the points advanced by the dissenting opinion in the Court of Appeals is that the case should be remanded to the district court for further findings on this precise issue.

Neither Monell nor any other case requires a finding of liability by an individual police officer before a municipality can be held liable for actions which cause a constitutional deprivation. Thus, the plaintiff might well elect not to sue the officer or officers who inflicted a particular injury, choosing instead to sue only the municipality. The decision of the Court of Appeals in this case would preclude such a tactical choice and require the plaintiff in every instance to sue both the municipality and all participating

individual officers. Such a requirement makes no sense.

In this case, the patrolman whose gun fired the fatal bullet was only the last link in a chain of events which caused the plaintiff's injury. That officer, it was clear, was only following the orders of his superiors. It is entirely consistent with a finding that he was not liable to say that the municipality which created the policy was liable and, indeed, that the training supervisor who designed the policy also would have been liable had he been sued.

Thus, the Court of Appeals violated the prior holdings of this Court and established a dangerous and irrational precedent in holding that municipal liability must as a matter of law be conditioned upon the

liability of one individual officer who clearly did nothing but follow his orders.

II

THE HOLDING IN DANIELS V. WILLIAMS AND DAVIDSON V. CANNON, THAT A DEPRIVATION OF DUE PROCESS CANNOT RESULT SOLELY FROM NEGLIGENCE DOES NOT EXTEND TO DEPRIVATIONS OF THE FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEIZURES.

In Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986), this Court overruled Parratt v. Taylor, 451 U.S. 527 (1981), "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." This Court held that unintentional injuries do not violate the due process clause.

This case presents a claim of unreasonable seizure in violation of the Fourth

Amendment, under Tennessee v. Garner, 471 U.S. 1 (1985). This Court has never held that negligent or unintentional actions cannot as a matter of law violate the Fourth Amendment. Indeed, such a proposition would make no sense. Unintentional violations of the Fourth Amendment frequently occur and as frequently have been the subject of suppression orders at the trial level in criminal cases. Under such circumstances, the individual officer might well have a qualified immunity defense, but no such defense would be available to the municipality. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

In holding that, as a matter of law, the Fourth Amendment violations must be intentional in order to be actionable, the Court of Appeals went far beyond any prior

holding of this or any other Appellate Court and produced a result which is entirely contrary to the history of Fourth Amendment law and to good sense.

III

UNDER TENNESSEE V. GARNER, A "SEIZURE" IS NOT COMPLETE FOR FOURTH AMENDMENT PURPOSES AS SOON AS THE FIRST HAND-CUFF IS APPLIED IN THE FIELD.

The majority of the Court of Appeals held here that for purposes of Tennessee v. Garner, 471 U.S. 1 (1985), the seizure of the victim was complete the moment the first handcuff was affixed to the his left wrist. Obviously, on the facts of this case, that holding is utterly illogical because the death admittedly was caused while the patrolman was attempting to complete the process of handcuffing the victim in preparation for transporting him

to police headquarters for booking. Thus, to hold as the Court of Appeals did here, that the arrest had been completed prior to the victim's death is not only contrary to law but also contrary to reason. It makes no more sense to so hold than it would to hold that the Fourth Amendment seizure in Tennessee v. Garner was completed upon ordering the victim to halt so that the subsequent shooting would not have been affected by Fourth Amendment considerations.

The only reasonable rule consistent with the policy of Tennessee v. Garner would be that articulated by the Ninth Circuit in Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985): "Seizure continues throughout the time the arrestee is in the

custody of the arresting officers....Therefore, excessive use of force by a law enforcement officer in the course of transporting an arrestee gives rise to a Section 1983 claim based upon a violation of the Fourth Amendment." See also, Gilmere v. City of Atlanta, 774 F.2d 1195, 1202 (11th Cir. 1985) (en banc), cert. denied 106 S.Ct. 1970 (1986).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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APPENDIX A

DECISION OF U.S. DISTRICT COURT

DODD V. CITY OF NORWICH

603 F.Supp. 514 (D.Conn. 1984)

MEMORANDUM OF DECISION

BLUMENFELD, Senior District Judge.

This is an action pursuant to 42 U.S.C. §1983 to recover money damages for the death of Dwayne Dodd. The plaintiff's decedent died of a gunshot wound suffered while he was being handcuffed by the defendant, Eric Larson, an auxiliary officer of the Norwich Police Department. The plaintiff has also sued the City of Norwich, claiming that Larson had been inadequately trained and that he was acting pursuant to an official policy or custom of the city. In addition, there are pendent state law claims sounding in negligence.

FACTS

Dwayne Dodd and Jervis Bell were robbing a house in the City of Norwich, which, unbeknownst to them, was equipped with a silent burglar alarm. Two police officers were dispatched to the house: Eric Larson and Larry Rice. Larson took a position at the rear of the house and Rice at the front of the house. Rice observed, through the front door, two persons inside the house and informed Larson that there were two or more burglars. Shortly thereafter, Dodd stuck his head out an open window in the rear of the house. Larson, with his gun drawn, ordered Dodd to come out of the house. Dodd complied and fell through the window to the ground below among some shrubs.

While Dodd was lying on the ground,

Rice returned to the rear of the house and saw Dodd. Then Rice went again to the front of the house and apprehended Bell who ran out the front door. While Rice was in the front, Larson decided to handcuff Dodd. To accomplish this task, Larson ordered Dodd to place both hands in front of his head and lie with his face on the ground. (Dodd had fallen with his left hand in front of his head and his right arm bent with his hand partly under his chest.) Dodd did not comply and remained in the position in which he had fallen.

Larson then approached the defendant and knelt in front of Dodd's head within one foot of him. With the gun held in his right hand, Larson placed a cuff on Dodd's left wrist. Larson then pulled the left wrist to the small of Dodd's back. Larson released the left hand and the handcuffs

and reached for Dodd's right hand. Dodd then jerked forward and reached, with his right hand, for Larson's gun. Larson instinctively reacted by pulling his hand (and the gun) away from Dodd. During this scuffle, the gun discharged and Dodd died within a few minutes.

DISCUSSION

The plaintiff contends that Dodd was deprived of his life without due process of law. The plaintiff does not contend that Larson intentionally shot Dodd; rather, the plaintiff claims that Larson was negligent in his use of force. This case poses two questions: (1) is negligence (even gross negligence) by a police officer a basis for a claim that one has been deprived of liberty without due process of law, and (2) was Larson negligent.

I. SECTION 1983

The plaintiff contends that gross negligence on the part of a police officer is sufficient to establish a violation of the plaintiff's decedent's constitutional rights; nor does the defendant dispute that this is the applicable standard of liability. I, however, am not persuaded that grossly negligent conduct violates any constitutional right.

It is well-established that the intentional exercise of excessive force by a police officer is a violation of constitutional rights; however, there has been some dispute as to the precise right which is violated. The cases appear to have concluded that the right in issue is the right to due process of law prior to being deprived of a liberty or property interest.

See, e.g., Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

In this case, the plaintiff does not contend that the officer intentionally used excessive force; rather, the plaintiff contends that the officer was negligent in his use of force. Larson's use of the threat of deadly force (which is the force he intended to use) was appropriate as there was probable cause to believe that Dodd had just committed a burglary.

The plaintiff cites Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984), for the proposition that gross negligence amounting to a conscious indifference is a violation of section 1983. Languirand might be dis-

tinguished because it dealt with the liability of a municipality for its police officers' violations of constitutional rights, rather than the conduct of the police officers which would violate constitutional rights.[1] In any event, I am persuaded by the rationale of Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), which held that gross negligence is not a violation of a constitutional right. In Gilmere, the court held that the intentional use of force by a police officer did not amount to a violation of the due process clause, if the state provided a post-deprivation cause of action for assault and battery. Id. at 905-10.

1 The Fifth Circuit explicitly refrained from expressing an opinion as to the appropriate standard of liability for the police officers' conduct. Id. at 223 n. 4.

> If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under Section 1983.

Roberts v. Marino, 656 F.2d 1112, 1114 (5th Cir. 1981) (quoting Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981)) (emphasis added).

The plaintiff in Gilmere contended that the rationale of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), was limited to negligent deprivations. In this case, however, the plaintiff only contends that there was a negligent (or grossly negligent) deprivation by the officer. The circumstances in which this deprivation occurred made a pre-

deprivation hearing impractical. Cf., Parratt, 451 U.S. at 540-41, 1010 S.Ct. at 1915-16. The laws of the State of Connecticut provide the plaintiff with a cause of action sounding in negligence, but

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under §1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under §1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 710

> [96 S.Ct. 1155, 1165, 47 L.Ed. 2d 405] (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Parratt, 451 U.S. at 544, 1010 S.Ct. at 1917. Larson, then, did not violate Dodd's constitutional rights. The plaintiff's section 1983 claims against the City of Norwich must also fail because it would only be liable if Dodd's constitutional rights were violated by Larson and that violation was a result of an official policy or custom. See Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

II. PENDENT STATE LAW CLAIMS

The plaintiff contends that Larson was negligent in his failure to conform his conduct to minimally acceptable standards

of police conduct. These standards, as will be discussed further, are designed to ensure the safety of the officer and not of the person he is arresting. The plaintiff also contends that Larson placed himself in a position of jeopardy where he feared for his life. The plaintiff contends that this fear caused Larson to cock his gun while handcuffing Dodd.

Larson testified that it is contrary to the policies of the City of Norwich and accepted police practice to draw a gun while it is cocked. When cocked, the amount of pressure on the trigger required to discharge the gun is much less than when it is not cocked. Thus, a cocked gun is more likely to discharge accidentally. The plaintiff contends that the ammunition issued by the Norwich Police Department

when Dodd was killed was defective and/or old; thus, it required more power to be exploded than ordinary ammunition. When Larson's weapon was tested by Trooper Robinson of the Forensic Examination Division of the State Police, the gun consistently failed to fire when it was not cocked. (This was using the ammunition which was in the gun; with ordinary ammunition, it fired when not cocked.) If a gun is fired when it is cocked, the hammer travels a greater distance and hence has more power than when it is fired without being cocked. The plaintiff concludes that the gun must have been cocked in order to have fired at the time of the shooting. Of course, the plaintiff's scenario also requires assuming that Larson knew the gun would not fire unless it was cocked. However, Trooper Robinson

could not conclude whether the gun was cocked or not at the time of the shooting. Nor does the plaintiff's theory persuade me to disbelieve Larson's testimony that the gun was not cocked.

The plaintiff presented expert testimony to support her claim that Larson acted negligently. The plaintiff's expert, Louis J. Reiter, has impeccable credentials: he worked his way through the ranks of the Los Angeles Police Department to become the Deputy Chief. Reiter specified a number of defects in Larson's conduct which led him to the conclusion that Larson was negligent. Larson should not have handcuffed Dodd in the spot where he did: Larson exposed himself to the potential danger that Dodd's fellow-burglar would appear at the window above his head, and Larson gave

up the control that he had had from maintaining observation of the house and its surroundings. Larson should not have handcuffed Dodd until Dodd cooperated by placing both hands in front of him: Larson thus exposed himself to the danger that Dodd would be in a position to resist. And Larson should have put his gun away before handcuffing Dodd: Dodd might have succeeded in taking the gun away from Larson.

This litany of failures presented by the plaintiff, if they were negligent, were negligent with respect to Larson's safety and not Dodd's. It is an elementary principle of tort law that one must violate a duty of care to the plaintiff; it is not sufficient to show that the defendant breached a duty of care to himself or someone other than the plaintiff. W. Prosser,

Law of Torts §53 at 324-27 (4th ed. 1971). Thus, these failures do not constitute negligence which results in any liability to the plaintiff.

The plaintiff's expert identified only one failure of Larson which increased the risk of injury to Dodd: Larson had his finger on the trigger at the time the gun discharged. Reiter testified that this was negligent; the proper procedure is to place one's finger alongside the trigger until one intends to shoot. But Reiter also testified that it was a common practice in may police departments to place one's finger on the trigger whenever the gun is drawn. Furthermore, the Police Chief of Norwich and the officer who trained Larson testified that it was standard practice and that it was not negligent to place one's

finger on the trigger. Although the practice preferred by the plaintiff's expert may be safer, I conclude that it was not negligent for the defendant to place his finger on the trigger while holding his gun.

The foregoing constitutes the court's findings of fact and conclusions of law pursuant to Rule 42 of the Federal Rules of Civil Procedure. Judgment shall enter for the defendants.

SO ORDERED.

APPENDIX B

DECISION OF COURT OF APPEALS

DODD V. CITY OF NORWICH

815 F.2d 862 (2d Cir. 1987)

Before MESKILL and PRATT, Circuit Judges, and EDMUND L. PALMIERI, District Judge of the Southern District of New York, sitting by designation.

GEORGE C. PRATT, Circuit Judge:

Velma Dodd, individually and as administratrix of the estate of her son, Dwayne Dodd, appeals from the dismissal of her complaint after a bench trial. She seeks damages for the death of her son, who was shot to death in a struggle over the gun of defendant Eric Larson, a relief police officer working part time for defendant City of Norwich, while Larson was trying to handcuff Dodd.

Plaintiff's claims against officer Larson and the city asserted both civil rights violations pursuant to 42 U.S.C. §1983 and negligence under Connecticut's wrongful death statute, Conn. Gen. Stat. §52-555. On the §1983 claim the district court found that officer Larson did not violate Dodd's constitutional rights and was therefore not liable. In addition, the court concluded, erroneously as we point out below, that absent a constitutional violation by Larson there could be no §1983 claim against the city. On the pendent state law wrongful death claim the court found that officer Larson was not negligent. Accordingly, the district court directed entry of judgment in favor of the defendants. 603 F.Supp. 514.

For the reasons set forth below, as to

officer Larson, we affirm the dismissal of the wrongful death claim on the basis of that he was not negligent, but reverse the judgment on Dodd's constitutional claims and remad for reconsideration under the Fourth Amendment. As to the City of Norwich, we reverse both the constitutional claims and the wrongful death action and remand for reconsideration of whether the adoption of the municipal policy followed by Larson violated the Fourth Amendment and/or was negligent under state law.

BACKGROUND

The facts surrounding the tragic death of this sixteen years old boy are graphically set forth in the district court's opinion:

> Dwayne Dodd and Jervis Bell were [burglarizing] a house in the City of Norwich, which, unbeknownst to them, was equipped

with a silent burglar alarm. Two police officers were dispatched to the house: Eric Larson and Larry Rice. Larson took a position at the rear of the house and Rice at the front of the house. Rice observed, through the front door, two persons inside the house and informed Larson that there were two or more burglars. Shortly thereafter, Dodd stuck his head out an open window in the rear of the house. Larson, with his gun drawn, ordered Dodd to come out of the house. Dodd complied and fell through the window to the ground below among some shrubs.

While Dodd was lying on the ground, Rice returned to the rear of the house and saw Dodd. Then Rice went again to the front of the house and apprehended Bell who ran out the front door. While Rice was in the front, Larson decided to handcuff Dodd. To accomplish this task, Larson ordered Dodd to place both hands in front of his head and lie with his face on the ground. (Dodd had fallen with his left hand in front of his head and his right arm bent with his hand partly under his chest.) Dodd did not comply and remained in the position in which he had fallen. Larson then approached the [decedent] and knelt in front of Dodd's head within one foot of him. With the gun held in his right hand,

Larson placed a cuff on Dodd's left wrist. Larson then pulled the left wrist to the small of Dodd's back. Larson released the left hand and the handcuffs and reached for Dodd's right hand. Dodd then jerked forward and reached, with his right hand, for Larson's gun. Larson instinctively reacted by pulling his hand (and the gun) away from Dodd. During this scuffle, the gun discharged and Dodd died within a few minutes.

DISCUSSION

A. Claims Against Officer Larson.

1. Constitutional Claims.

Since decision of this case by the district court, the Supreme court has provided us with additional enlightenment as to the rules applicable to constitutional claims such as plaintiff asserts here. In Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and Davidson v. Cannon, 474 F.2d 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986),

the Court overruled Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." Daniels, 106 S.Ct. at 665. The due process clause "is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." Davidson, 106 S.Ct. at 670. According to the court, "[h]istorically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property", Daniels, 106 S.Ct. at 665 (emphasis by the Court), and conduct that is merely negligent "does not implicate the Due Process Clause of the

Fourteenth Amendment." Id. at 666.

In short, after Daniels and Davidson, to establish a violation of the due process clause a plaintiff must prove that defendant "deprived" him of life, liberty or property, a concept clearly satisfied by intentional conduct, but clearly not satisfied by conduct that is merely negligent. The Court has expressly left open the question of whether something less than intentional conduct, such as defendant's "recklessness" or "gross negligence", may also be enough to trigger the protection of the due process clause.

In a separate ruling, and without discussing due process concepts at all, the Supreme Court in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), turned to the Fourth Amendment and

adopted a test of "reasonable seizure" to determine whether a police officer violates the constitution by shooting a fleeing burglar in the back. According to the Court, "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment", Garner, 105 S.Ct. at 1699, and "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrustion.'" Id. (quoting United States v. Place, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983)).

When it held that Dodd's claim of

negligence by Larson did not give rise to a constitutional claim, the district court anticipated the Supreme Court's rulings in Daniels and Davidson, and insofar as the dismissal was based on a failure to make out a due process violation, the decision below must be regarded as correct. The district court did not, however, have the benefit of the Supreme Court's Fourth Amendment analysis as developed in Garner; therefore it did not consider whether, under the circumstances, Larson's "seizure" of Dodd was unreasonable. Accordingly, we remand the §1983 claim against officer Larson to the district court for further consideration under the Fourth Amendment, to determine in light of Garner whether Larson's "seizure" of Dodd was reasonable, and, if so, whether Larson himself is liable

therefor under §1983. In considering Larson's possible personal liability under the Fourth Amendment, the district court should also consider whether he is entitled to a qualified good faith immunity based on his following the policy and training of the police department in keeping his gun unholstered while attempting to place handcuffs on Dodd.

Plaintiff also argued to the district court that officer Larson's conduct was not merely negligent, but was grossly negligent and therefore violated due process. This claim was rejected by the district court in two ways. Expressly, the district court held that not even a grossly negligent claim would constitute a constitutional violation. On this question, as we have indicated, the Supreme Court expressly

reserved decision in Daniels, 106 S.Ct. at 667 n. 3. It is not necessary for us, either, to face this issue, because the district court found on the facts that Larson was not even negligent. Since, as we shall demonstrate in the discussion below of the wrongful death claim, this finding is not clearly erroneous, it forecloses, a fortiori, any possibility that Larson might have been reckless or grossly negligent.

2. Wrongful Death Claim.

Plaintiff's wrongful death claim against Larson rests on negligence. She claims Larson was negligent in attempting to handcuff Dodd before he was cooperating by placing both hands in front of him, in not putting his gun away before attempting to handcuff Dodd, in having his gun cocked,

and in placing his finger on the trigger while holding the gun.

The district court rejected all these claims. Based on conflicting testimony as to proper police procedure, it concluded that Larson was not negligent in having his finger on the trigger of the gun. It further found that the gun was not cocked. On this record neither finding is clearly erroneous.

With respect to not holstering the gun before handcuffing Dodd, the uncontradicted testimony was that Larson behaved in exactly the manner in which he had been trained by the city's police department. As to handcuffing Dodd in that particular place near the house, and in doing so before Dodd himself extended both arms, the district court found that those considera-

tions were designed to secure the safety of Larson, rather than Dodd, and therefore could not be a proper predicate for a negligence finding in favor of Dodd.

Under these circumstances, it is apparent that neither negligence nor, of course, recklessness or gross negligence is a factor in the case against Larson. Since the district court's findings with respect to the absence of negligence by Larson are not clearly erroneous, the pendent wrongful death claim against him was properly dismissed.

In sum, as to the claims against officer Larson, the district court properly dismissed the pendent wrongful death claim, and if due process were the only constitutional provision that could underlie plaintiff's §1983 claim, the district court

would have been correct in dismissing that claim as well. However, it is necessary to remand the §1983 claim against Larson for further analysis by it in the first instance under the Supreme Court's holding in Garner to determine whether the shooting of Dodd was an unreasonable seizure within the meaning of the Fourth Amendment.

B. Claims Against the City of Norwich.

1. Constitutional Claim.

As to the §1983 claim against the city, the district court dismissed because of its erroneous view that the city would be liable only if Dodd's constitutional rights had been violated by Larson. There is no such requirement in the law. Under Monell v. Dep't of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978), a municipality may be found directly

liable under §1983 "when execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury * * *". The city may be held liable under §1983 when "official policy [is] the moving force of the constitutional violation". Id.

Although a single brutal act by a low-level police official is insufficient to establish a policy that would render the city liable, Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985), it seems clear that a municipality may he held liable under §1983 if plaintiff establishes that it was the municipality that subjected him to the deprivation of his constitutional rights. A plaintiff may do this by proving both the

existence of a municipal policy or custom and a causal connection between that policy or custom and the deprivation of his constitutional rights. Oklahoma City, 105 S.Ct. at 2436 (plurality opinion), id. at 2439 (Brennan, J., concurring). See also Vippolis v. Village of Haverstraw, 768 F.2d 40, 44 (2d Cir. 1985).

Plaintiff's theory of liability against the city focused upon the training given to officer Larson with respect to using his gun while handcuffing a suspect. The chief of police testified that Larson had been trained to keep his gun out, aimed at the suspect, while attempting to apply handcuffs, and that when officer Larson did so here he was acting in accordance with the policy of the city's police department.

Plaintiff's expert, Louis J. Reiter, a

former deputy chief of the Los Angeles Police Department, who the district court found had "impeccable credentials", testified, however, that the policy of keeping a gun in hand while attempting to handcuff a suspect was contrary to the practice of most police departments, and was particularly dangerous because it puts the gun within reach of the suspect, and, in effect, invites a struggle with a possibility that the gun will go off. According to Reiter, the correct procedure is to put the revolver away and then go through the handcuffing process. Reiter further testified that the city's policy, conveyed to its police officers, including Larson, through its training program, constituted gross negligence amounting to conscious indifference to the life and safety of the

people being arrested. In this instance, Reiter testified, the city's policy was the proximate cause of Dodd's death.

In light of this testimony, we think the district court erred in ending its analysis of plaintiff's Monell-type claim with its conclusion that officer Larson did not violate Dodd's constitutional rights. We have already held earlier in this opinion that that conclusion requires further analysis to determine whether Larson's "seizure" of Dodd was unreasonable. If the seizure was reasonable under Garner, then neither Larson nor the municipality could be liable for violating Dodd's Fourth Amendment rights. See City of Los Angeles v. Heller, ___ U.S. ___, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986). Even if the seizure was not reasonable, Larson still might not

be liable because of his reliance on municipal policy in handcuffing Dodd as he did. See §A(1) supra. As to the city, there would still remain the question of whether the municipal policy itself "caused" Dodd's death. As pointed out by plaintiff's expert, if the gun is left out of the holster during handcuffing, it increases the likelihood of a struggle and injury through accidental discharge of the gun.

While it is true, as the district court noted, that the city's policy is designed to protect Larson from injury, that cannot be its only purpose; the policy must also be designed to protect arrestees from unnecessary gunshot injuries or death. Such a policy with respect to the proper handling of a gun while handcuffing a

suspect may be adopted only after balancing the various risks created by the policy against the benefits it achieves. See Garner, 105 S.Ct. at 1700-01.

The district court, however, gave no consideration to the existence of the policy, whether the policy caused Dodd's death, and if so, whether the city would thereby be rendered liable under Monell. Instead, the court simply dismissed the claim against the city on the ground that plaintiff had failed to establish liability against the individual police officer. Where, as here, a police officer carries out municipal policy with the result that an arrestee is killed, there is a potential for municipal liability even though the police officer may be personally immune from liability for having executed the

arrest in the manner in which he had been trained under the city's policy. Cf. Los Angeles v. Heller, 106 S.Ct. at 1573 (verdicts establishing no unconstitutional arrest and no use of excessive force necessarily exonerated both police officer and municipality).

The city contends on appeal that the "cause" of Dodd's death was his own voluntary act in lunging for the exposed gun and was not any act or policy of the city. Monell's view of causation is, we think, more encompassing than such a narrow, immediate focus on the cause of the shooting. In adopted its policies a municipality must take into consideration the reasonably foreseeable conduct not only of its own employees but also of those citizens with whom its employees will interact.

Basic principles of causation would render the policy a proximate cause of Dodd's death if Dodd's intervening actions were "within the scope of the original risk" and therefore foreseeable. W. Prosser, Handbook of the Law of Torts §44, at 273 (4th ed. 1971). If Reiter's testimony is to be credited, a matter for the district court to consider, then the district court might well find that the city's policy of training its officers to handcuff suspects with guns drawn "caused" Dodd's death by, in effect, inviting him to lunge for the gun. Since such a policy could serve as the basis for §1983 liability under Monell, we find it necessary to remand the §1983 claim against the city for further consideration.

2. Wrongful Death Claim.

To the extent that the wrongful death

claim against the city was based on the doctrine of respondeat superior, it was derivative from, and therefore properly dismissed with, the negligence-based claim asserted against officer Larson. Plaintiff's wrongful death claim against the city, however, must also be viewed as charging negligence in the city's adoption of the gun-use policy.

Exonerating officer Larson from negligence does not necessarily exonerate the city from liability for adopting the gun policy on which officer Larson relied. Separate analysis under applicable principles of Connecticut negligence law must be applied to determine whether the city's policy and training with respect to the use of guns during handcuffing was negligent, and, if so, whether it was a proximate

cause of Dodd's death, see Bonsignore v. City of New York, 683 F.2d 635, 637 (2d Cir. 1982), and that analysis in the first instance should be done by the district court.

CONCLUSION

As to defendant Larson the judgment is affirmed insofar as it dismissed the wrongful death claim against him, but with respect to the claim under §1983 the judgment is reversed and the case is remanded for further consideration. As to defendant City of Norwich, the judgment is reversed and the case is remanded for further consideration of both the wrongful death and §1983 claims.

PALMIERI*, District Judge, dissenting:

I respectfully dissent.

Since I believe that, as a matter of law, no Fourth Amendment violation or municipal negligence was responsible for the course of events underlying this litigation, I cannot join that portion of the court's opinion which reverses and remands certain aspects of plaintiff's claim.

The recognition of a valid cause of action in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), does not in my opinion justify the majority's view that it requires an inquiry by the district court as to whether the "seizure" of Dodd was reasonable. Garner bars the

* District Judge of the Southern District of New York, sitting by designation.

deliberate use of deadly force to seize an unarmed, fleeing, suspected felon. 471 U.S. 1, 11, 105 S.Ct. 1694, 1700, 85 L.Ed.2d 1 (1985). Here we are dealing with the inadvertent shooting of an already apprehended burglar during a struggle initiated by him in an attempt to disarm the arresting officer and after he had apparently surrendered. Nothing in Garner contemplates unintentional conduct, and the court below made an explicit finding that the police officer was not even negligent. I would therefore hold as a matter of law that the circumstances surrounding the arrest of Dodd, for which Larson had probable cause, did not constitute an unreasonable seizure under the Fourth Amendment. A remand of the §1983 claim as to Larson would consequently be inappropriate.

If Dodd's Fourth Amendment rights were not violated, the city cannot be held liable for a constitutional violation under 42 U.S.C. §1983. As the Supreme Court recently stated, if the agent "inflicted no constitutional injury on [the victim], it is inconceivable that [the principal] could be liable" to the victim under §1983. City of Los Angeles v. Heller, ___ U.S. ___, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986).

Additionally, I cannot agree with the majority's suggestion that the city might be negligent under the Connecticut wrongful death law. Judge Blumenfeld's careful evaluation of the facts makes it quite clear to me that he would not find the city negligent. On the basis of his factual conclusions, which I consider to be unassailable, it would take a quantum leap

leap of the imagination to find a causal link between Larson's police training under the auspices of the City of Norwich and the fatal accident which occurred during the nighttime arrest of a burglar caught in flagrante delicto.

I join the majority opinion only insofar as it affirms the dismissal of the wrongful death claim under state law as to Larson. I would affirm the judgment of the district court.

APPENDIX C

DECISION OF COURT OF APPEALS

AFTER REARGUMENT

DODD V. CITY OF NORWICH,

827 F.2d 1 (2d Cir. 1987)

ON REARGUMENT

PALMIERI, District Judge:

Having heard reargument, we now conclude that the part of our earlier decision, Dodd v. City of Norwich, supra, providing for a remand to the district court should be vacated and that the judgment of the district court should be affirmed in its entirety. We hold that, as a matter of law, no Fourth Amendment violation or municipal negligence was responsible for the course of events underlying this litigation. The discussion that follows assumes familiarity with our prior opinion.

In our earlier decision we remanded the case to the district court to consider whether Larson's shooting of Dodd was an unreasonable seizure under the Fourth Amendment in accordance with Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L. Ed.2d 1 (1985). The recognition of a valid cause of action in Garner, however, does not justify an inquiry by the district court as to whether the "seizure" of Dodd was reasonable. Garner bars the deliberate use of deadly force to seize an unarmed, fleeing, suspected felon. 471 U.S. at 11, 105 S.Ct. at 1701. Here we are dealing with the inadvertent shooting of an already apprehended burglar during a struggle initiated by him in an attempt to disarm the arresting officer and after he had apparently surrendered. Larson's shooting

of Dodd was not for the purpose of seizing him. The shooting was a pure accident. For all intents and purposes, the seizure of Dodd had already taken place by the time Larson placed a cuff on one of Dodd's wrists. Lardon did not act unreasonably in seizing Dodd in this fashion.

It makes little sense to apply a standard of reasonableness to an accident. If such a standard were applied, it could result in a Fourth Amendment violation based on simple negligence. The Fourth Amendment, however, only protects individuals against "unreasonable" seizures, not seizures conducted in a "negligent" manner. The Supreme court has not yet extended liability under the Fourth Amendment to include negligence claims. Only cases involving intentional conduct have been

considered by the Supreme Court. Negligence, in fact, has been explicitly rejected as a basis for liability under the Fourth Amendment. See Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). Larson, therefore, did not deprive Dodd of any constitutional rights in effectuating the arrest.

The original panel decision also held that the city can be held liable under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), if police department training policy caused Dodd's death, even if Larson was not negligent. We, therefore, remanded the section 1983 claim against the city for further consideration under Monell. This

holding, however, is incompatible with the Supreme Court's decision in City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986). In that case, the Court stated: "if a defendant has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." Id. 106 S.Ct. at 1573. Thus, since Larson did not violate Dodd's Fourth Amendment rights, the city cannot be held liable for a constitutional violation under 42 U.S.C. §1983. See also Swink v. City of Pagedale, 810 F.2d 791, 794-95 (8th Cir. 1987) (following Heller).

Our original panel decision upheld the district court's rejection of Dodd's wrong-

ful death claim on the grounds that Larson was not negligent in apprehending Dodd, but went on to hold that a wrongful death action may be maintained against the city for negligent adoption of the gun use policy. The problem with that analysis is that Larson followed the gun use policy to the letter. It has already been determined that Larson's actions were not negligent and were, in fact, reasonable. Judge Blumenfeld specifically stated that "it was not negligent for the defendant to place his finger on the trigger while holding his gun." The judge clearly did not believe Dodd's expert who testified that this policy of keeping a gun in hand while attempting to handcuff a suspect was dangerous and contrary to the practice of most police departments. Because the

district court has held that the procedure followed by Larson was reasonable, it follows that the city cannot be held liable in negligence for adopting it. Accordingly, this portion of the prior panel decision is vacated.

The decision of the district court is therefore affirmed in its entirety.

PRATT, Circuit Judge, dissenting:

The majority's disposition of this appeal establishes significant law for this circuit. Because of the brevity of the majority opinion, I think it is important for future cases to highlight its holdings, both explicit and implicit, even though I disagree with them. The majority holds:

Once a police officer applies a single handcuff to an arrestee, the "seizure" is

complete for Fourth Amendment purposes (indeed, "for all intents and purposes"), and there is no duty of reasonableness under Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), for anything that follows.

Any municipal arrest policy, so long as it does not authorize the intentional use of unreasonable force, is immune from Fourth Amendment scrutiny, no matter how likely it might be to cause "inadvertent" injuries or deaths.

The Supreme Court's holdings in Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.1d 662 (1986), and Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), that a deprivation of due process cannot result solely from negligence, extend to deprivations of the

Fourth Amendment right to be free of unreasonable seizures, and perhaps to deprivations of other substantive constitutional protections as well.

From each of these holdings, I dissent.

In our first decision on this appeal, Dodd v. City of Norwich, supra, we held that plaintiff Velma Dodd, individually and in her capacity as administratrix of decedent Dwayne Dodd's estate, (1(had a potential cause of action under the Fourth Amendment and 42 U.S.C. §1983 against the City of Norwich and police officer Eric Larson, based on the Supreme Court's decision in Garner, resolution of which required remand to the district court; (2) had a potentially valid wrongful death claim under Connecticut law against the city, but not against Larson, based on the

city's policy of training police officers to hold their guns while attempting to handcuff arrestees; but (3) did not have a claim under the Fourteenth Amendment for denial of due process after the Supreme Court's decisions in Daniels and Davidson, which held that "mere negligence" does not constitute a deprivation of due process. In short, we concluded that the city's policy, as carried out by Larson, had to be considered for its reasonableness as a means of effecting seizures both in light of Garner and under Connecticut tort law.

On motion of appellees, we granted reargument to get the views of counsel on five recent Supreme Court cases cited in our prior decision: Garner, Daniels, Davidson, City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d

806 (1986), and Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). After the reargument and after further deliberation, Judge Meskill became convinced that in his original vote he had erred. Displaying the candor and courage to which all of us aspire, he has changed his vote and now joins with Judge Palmieri in affirming.

I am not similarly persuaded, however, by Judge Palmieri's analysis, and my view is still that the proper disposition of this appeal is as stated in my earlier opinion. I see no reason why a municipal policy for effecting seizures cannot be "unreasonable" under Garner when the attendant risk of accident harm is so grave as to outweigh the societal interests that are furthered by the policy.

The policy of the City of Norwich differs, according to the uncontradicted testimony of plaintiff's expert witness, from that of every other police department in the country. Whether Dodd's death was forseeable, given the unique gun-use policy adopted by the city, would seem to be a question of fact, not a question of law. If it was forseeable, then surely Dodd's "accidental" death was, in reality, an accident waiting to happen, and the city's policy might then be unreasonable, even if Larson himself, who was trained to follow that policy, was found to be not negligent in his own conduct. The city's no-holster policy should thus be separately assessed -- by the district court in the first instance -- under the Garner test.

The majority rejects this potential

Monell claim, Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), by finding it to be incompatible with the Supreme Court's holding in Heller. However, to apply Heller, where the police officer did not follow the allegedly unconstitutional municipal policy, to this case where Larson —"followed the city's gun use policy to the letter", establishes a "reverse respondeat superior" principle to the effect that the city cannot be held liable unless the officer is also held liable.

But this is not the teaching of Heller. There, while Heller had been injured during the course of his arrest, his injury and the other evidence did not establish excessive force and, therefore, did not cause him any constitutional deprivation. Thus,

Heller determined merely that with respect to the particular violation at issue there, no constitutional violation had occurred at all.

By contrast, Dodd was deprived of his life, surely a constitutionally protected interest, and the question is whether the officer or the city can be held responsible for the loss. Finding no liability in Larson, the district court then moved automatically to a dismissal as against the city. In doing so it neglected to view the potential liability of the city as being based on different principles than the liability of its police officer. Rather than remanding for proper initial consideration of the city's liability by the trial court, the majority now prevents such an analysis by holding it to be unnecessary in

light of the new principles established on appeal in this case.

In this difficult area of the law, I think we should be more cautious in applying blanket, even novel rules without having them first fully considered by the district court. Decisions on civil rights issues, particularly on those involving alleged police misconduct, are often troubling and difficult, as reflected in the conflicts in the circuits on many of the very issues in this case. See, e.g., Jamieson by and through Jamieson v. Shaw, 772 F.2d 1205, 1211 (5th Cir. 1985) (use of "deadman roadblock" to effect seizure which caused accident seriously injuring passenger in automobile must be evaluated under Garner for reasonableness); Young v. City of Killen, Tex., 775 F.2d 1349, 1353 (5th

Cir. 1985) ("The constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest."); Leber v. Smith, 773 F.2d 101, 105 (6th Cir. 1985) (officer's drawing of weapon leading to unintentional firing when he slipped was subject to Garner analysis, but found reasonable under the circumstances); Galas v. McKee, 801 F.2d 200, 202 (6th Cir. 1986) ("[T]he reasonableness of a seizure or method of seizure cannot be challenged under the Fourth Amendment unless there has been a completed seizure (that is, a restraint on the individual's freedom to leave."); Robins v. Harum, 773 F.2d 1004, 1009-10 (9th Cir. 1985) ("once a seizure has occurred, it continues through-

out the time the arrestee is in the custody of the arresting officers").

These and other cases reflect an understandable uncertainty that has marked the initial wave of lower-court reaction to Garner's adoption of a "reasonable seizure" test to govern methods of arrest. Moreover, our dealing with civil rights claims arising out of encounters between police and citizens is complicated by the many seeming contradictions, reversals of field, and enigmatic opinions presented to us by the Supreme Court.

Because of these difficulties in the law, because of the tragic harm inflicted on the Dodd family, and because the district court has never directly focused on the city's potential liability as being a direct result of its own gun-use policy

as opposed to being merely a derivative consequence of Larson's conduct, I think a remand for such consideration would be the proper disposition of this appeal.

No. 87-722

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VELMA DODD, ADMINISTRATRIX
OF THE ESTATE OF DWAYNE DODD, *Petitioners*,

v.

CITY OF NORWICH AND ERIC LARSON, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can a municipality be held liable in a 42 U.S.C. Sec. 1983 action where a court has found that the police officer breached no duty and caused no constitutional deprivation?

II. Whether or not *Tennessee v. Garner*, 471 U.S. 1 (1985) establishes the standard by which lower courts are to determine the reasonableness of seizures under the Fourth Amendment?

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827 F. 2d 1 (2d Cir., 1987)

STATEMENT OF CASE

On October 13, 1981 at approximately 7:00 p.m., the petitioner's decedent, Dodd, and an accomplice were robbing a home in Norwich, Connecticut. Officer Rice and the respondent, Officer Eric Larson, were dispatched to the location of the felony in progress. In was dark. They heard noises inside the house. The respondent Larson proceeded to the rear of the home and Officer Rice approached the house from the front side. He saw two males inside the front door looking directly at him. Officer Rice yelled to the respondent Larson to stay at the rear of the house, as there were two males attempting to leave by an open window. Officer Larson observed Dodd stick his head out the window. Officer Larson did not know how many other persons were in the house and whether they or Dodd were armed. With gun drawn for his own protection, Officer Larson advised Dodd to exit through the window and to lie face down with his arms outstretched. Although Dodd lay on the ground, he did not comply with Officer Larson's orders in that he concealed one arm under his body. As Officer Larson did not know whether Dodd or any others in the house were armed, he approached Dodd with his gun unholstered but uncocked. Officer Larson had taken the precautionary measure of keeping the gun uncocked so as to make its discharge more difficult. His concern was that Dodd should be handcuffed. He knelt and handcuffed Dodd's left wrist. As Officer Larson reached for the right wrist, Dodd jerked forward grabbing the uncocked revolver in Larson's hand and pulling the revolver and hand toward himself. Larson instinctively jerked back and the gun went off.

After hearing all evidence and argument, the District Court determined that Larson was not negligent; he breached no duty to Dodd and Dodd suffered no constitutional deprivation. Judgment entered for the defendants.

The plaintiff appealed. The Circuit Court initially reversed in part on an issue not claimed, briefed or argued. The respondents filed a petition for rehearing, requesting that the Circuit Court consider significant findings of fact and law that had not been addressed. The Circuit Court granted the petition. After briefs and argument, the Circuit Court reversed itself and affirmed the District

Court's decision in its entirety. The Circuit Court found that the shooting was not for the purpose of seizing Dodd and was a pure accident. (See Decision of Circuit Court of Appeals on Reargument, Appendix to Petition for Writ of Certiorari at 3c). The Circuit Court found no Fourth Amendment violation as a matter of law. The Circuit Court also followed the precedent established by the Supreme Court in the *City of Los Angeles v. Heller*, (1986) and reasoned that as the decedent did not suffer a constitutional injury, the city could not be held liable for any alleged constitutional violation. Whether a department policy is unconstitutional or authorized certain action is irrelevant if there was no constitutional injury. (See Decision on Reargument, Appendix to Petition for a Writ of Certiorari at 5c).

Moreover, the Circuit Court stressed that the District Court found that Larson's actions were "not negligent and were, in fact, reasonable" (See Decision on Reargument, Appendix to Petition for Writ of Certiorari at 6c) and that "the procedure followed by Larson was reasonable." (See Decision on Reargument, Appendix to Petition for Writ of Certiorari at 7c). These findings render the issues raised by the petitioners academic.

The plaintiff/appellant then filed this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This action was brought pursuant to 42 U.S.C. Sec. 1983. The petitioners claim that the City of Norwich adopted a policy which was unconstitutional and which resulted in an unreasonable seizure for the purposes of the Fourth Amendment to the United States Constitution. The District Court found that any action taken by Officer Larson was reasonable and further, that Larson breached no duty to Dodd and that Dodd received no constitutional injury as a result of any action of the respondent, Larson. Since there was no duty breached to Dodd and since he received no constitutional injury, no claim can be made that he received a constitutional injury as a result of any department policy.

The facts of this case and findings of the District Court and Circuit Court of Appeals do not merit review by the Supreme Court of the United States on the issues framed by the petitioner.

The petitioner has failed to raise the special and important reasons necessary to compel the Court to exercise its judicial discretion to accept the Writ of Certiorari. There is no conflict with decisions of other Circuit Courts of Appeal. The Circuit Court has not acted in any way to merit the exercise of the Court's supervisory power. In fact, the Circuit Court of Appeals in its decision upon reargument expressly followed the case law as set forth by the Supreme Court and refrained from expanding or deviating from the Supreme Court rulings.

The petitioner has not raised an important question of federal law supported by the findings of facts of this case which has not been settled by the Supreme Court of the United States.

The petitioner has not satisfied the requirements of Rule 17 of the Rules of the Supreme Court of the United States and has framed issues which are academic in light of the facts found in this case and attempts in essence to seek an advisory opinion on facts outside the scope of this case.

The respondents respectfully request that the Petition for Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

I. A Municipality May Not Be Held Liable In A 42 U.S.C. Sec. 1983 Action Where The Court Has Found That The Police Officer Breached No Duty And Caused No Constitutional Deprivation Pursuant To City of Los Angeles v. Heller, 475 U.S. 796 (1986).

In the complaint underlying this litigation, the petitioner alleged that Officer Larson had deprived Dodd of his Fifth, Sixth, Eighth and Fourteenth Amendment Rights. The District Court found that Officer Larson had breached no duty to the plaintiff and did not act negligently. The District Court concluded that Dodd did not suffer a deprivation of a constitutional right. The Circuit Court examined the question of whether or not Dodd suffered a deprivation of constitutional rights secured by the Fourth Amendment of the United States Constitution. At a rehearing when the issue was first addressed the Circuit Court found no violation as a matter of law. It follows that if Dodd's constitutional rights were not violated, he did not suffer a constitutional injury. The mere fact that a fatal accident occurred does not raise the injury to a constitutional level.

Monell v. The Department of Social Services of the City of New York, 436 U.S. 658 (1978) stands for the proposition that a municipality cannot be held liable on the basis of respondeat superior. It must first be shown that the complainant suffered a violation of a constitutional right and such violation was caused by the implementation of a municipal policy. The instant case fails as there was no violation of a constitutional right. Without a constitutional injury, no claim can be made that a policy caused a constitutional injury. In any event, the District Court found that the policy followed by the police officer was reasonable.

In *City of Los Angeles v. Heller*, 475 U.S 796 (1986), the plaintiff, claiming arrest without probable cause and with use of excessive force, sued a police officer and the municipality. When stopped for driving while under the influence, the plaintiff became belligerent. An officer attempted to cuff him. An altercation ensued and the plaintiff fell through a window. The Court held that if a police officer inflicted no constitutional injury, it is incon-

ceivable that the city can be liable. *Heller*, 106 S. Ct. at 1573. Moreover, where "the person has suffered no constitutional injury at the hands of the individual police officer, the fact that department regulations might have authorized the use of constitutionally excessive force is quite beside the point." (See Decision on Reargument, Appendix to Petition for Writ of Certiorari at 5c citing *Heller*.)

The *Heller* case does not insulate a municipality from liability under all circumstances nor does the Circuit Court's decision as the petitioner suggests. An example of this is where an officer is found not liable under a good faith immunity defense and yet, where constitutional rights have been found to be violated. See *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985). The instant case raised no such defense. The District Court and Circuit Court found no constitutional violation had occurred. *Heller* makes clear that for a plaintiff to recover it must suffer a constitutional violation and such constitutional violation must flow from an unconstitutional policy. It further found if there is no constitutional violation, liability cannot be predicated on any policy regardless of its constitutionality. Finally, the District Court in this case has found that the policy in question was reasonable.

The Circuit Court of Appeals properly followed the law established by the Supreme Court as it applies to the facts of the instant case. The Circuit Court on rehearing refrained from establishing new law without direction of this Court.

II. Tennessee v. Garner, 471 U.S. 1 (1985) Establishes The Standard By Which Lower Courts Are To Determine The Reasonableness Of Seizures For The Purpose Of The Fourth Amendment To The United States Constitution.

The Supreme Court sets fourth the standard by which lower courts are to review the reasonableness of seizures for the purpose of the Fourth Amendment in *Tennessee v. Garner*, 471 U.S. 1 (1985). *Garner* bars the deliberate use of deadly force to seize an unarmed, fleeing, suspected felon. *Garner*, 471 U.S. at 11. In *Garner*, a police officer followed a fleeing suspect. He was able to see the suspect's face and hands and was aware that the suspect was

unarmed. Feeling too fat to catch the suspect, he shot the suspect deliberately and intentionally in the back of the head as the suspect began to climb over a fence. In the instant case, the suspect had been apprehended; it was not yet known if he were armed; the shooting occurred inadvertently during a struggle initiated by the decedent in an attempt to disarm the officer. The shooting was an accident as found by the District Court and the Circuit Court and as conceded by plaintiff's expert and was not for the purpose of seizing Dodd. The Circuit Court found that there was no violation of Dodd's Fourth Amendment Rights as a matter of law. In dicta, the Circuit Court stated that "it makes little sense to apply a standard of reasonableness to an accident. If such a standard were applied, it could result in a Fourth Amendment violation based on simple negligence." (See Decision on Reargument, Appendix to Petition for Writ of Certiorari at 3c.) It must be remembered that Officer Larson was found not to have acted negligently and therefore it is merely academic to determine whether or not negligence may form a basis for liability under the Fourth Amendment. Moreover, the policy followed was found to be a reasonable one and the plaintiff offered no evidence that this was nothing more than a single incident or single accident.

The fallacy in the petitioner's analysis of the Circuit Court's opinion is further evidenced by the framing of the third question (See Petition for Writ of Certiorari, Questions Presented and Argument Section III). The petitioner represents in the third section of the argument in support of her Petition for Writ of Certiorari that the Circuit Court predicated its opinion on the conclusion that the seizure was completed by placing the handcuff on Dodd. This is not so. In fact, the Circuit Court stated that the shooting did not occur for the purpose of seizing Dodd and that the shooting was a pure accident. The Circuit Court stated that the shooting was inadvertent and occurred at a time when the plaintiff had apparently surrendered. The shooting occurred not as a result of the seizure, but as a result of Dodd's own deliberate actions. The issue for the purpose of the reasonableness analysis is not when the seizure was completed or whether seizure is a process but whether or not Officer Larson shot Dodd in order to seize him. The facts found by the lower courts show that the shooting was

a pure accident and not the result of any action on the part of Officer Larson, but rather the result of Dodd's lunging forward in an attempt to disarm Officer Larson.

It had been determined by the District court that Larson had his gun unholstered for his own protection and that it was not negligent for Larson to have his finger on the trigger of the uncocked gun. If his actions were not negligent, they were reasonable. The shooting was not for the purpose of effectuating the arrest. His conduct and the policy he followed were reasonable under the circumstances.

CONCLUSION

The respondents respectfully submit that the petitioners have failed to demonstrate a basis for the court to exercise its judicial discretion to grant the Petition for Certiorari. The Circuit Court of Appeals has properly applied the law as set forth by the Supreme Court in *Monell v. Department of Social Services, City of Los Angeles v. Heller* and *Tennessee v. Garner.* The Circuit Court judiciously refrained from expanding the law as established by the Supreme Court where the facts of the case did not so merit. The questions presented in the petitioner's Petition for Writ of Certiorari seek the Court's review of questions which are rendered academic by the facts and the law of this case.

The respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted:

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